INDEX

	Page
Opinion below	1
Jurisdiction	1
Statute and regulation involved	1
Question presented	3
Statement	3
Argument	6
Conclusion	11

CITATIONS

Cases:

Amarante v. *Rosenberg*, 326 F. 2d 58 — 8

Immigration and Naturalization Service v. *Errico*, 385 U.S. 214 — 9

Mantyk v. *Sahli*, 161 F. Supp. 199 — 10

Pacheco Pereira v. *Immigration and Naturalization Service*, 342 F. 2d 422 — 10

Scalzo v. *Hurney*, 225 F. Supp. 560, affirmed *per curiam*, 338 F. 2d 339, certiorari denied, 382 U.S. 849 — 8, 10

United States ex rel. Stellas v. *Esperdy*, 366 F. 2d 266, vacated and remanded on other grounds, June 12, 1967, No. 934 Misc., O.T., 1966 — 8

Statute and regulation:

Immigration and Nationality Act of 1952, as amended:

Sec. 101(f)(2), 8 U.S.C. 1101(f)(2) — 5

Sec. 201(b), 8 U.S.C. (Supp. II), 1151(b), formerly Sec. 101(a)(27)(A), 8 U.S.C. 1101(a)(27)(A) — 7

Sec. 204, 8 U.S.C. (Supp. II) 1154, formerly Sec. 205, 8 U.S.C. 1155 — 2, 3, 6, 10

Sec. 205, 8 U.S.C. (Supp. II) 1155, formerly Sec. 206, 8 U.S.C. 1156 — 1, 6, 10

Sec. 241(c), 8 U.S.C. 1251(c) — 10

Statute and regulation—Continued

	Page
Immigration and Nationality Act of 1952—Continued	
Sec. 241(f), 8 U.S.C. 1251(f)	9
Sec. 244(e), 8 U.S.C. 1254(e)	5
Sec. 245, 8 U.S.C. 1255	7
8 C.F.R. 205.1(a)	2
8 C.F.R. (1965 rev.) 206.1(b)(1)	2, 3, 6, 10

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 495

KUNIKO HARAGUCHI WRIGHT, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. 21–22) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1967. The petition for a writ of certiorari was filed on August 15, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATION INVOLVED

Section 205 of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. (Supp. II) 1155, provides:

> The Attorney General may, at any time, for what he deems good and sufficient cause, revoke the approval of any petition approved by him under section 1154 of this title. Such revocation shall be effective as of the date of approval of any such petition. In no case, however, shall such revocation have effect unless there is mailed to the petitioner's last known address a notice of the revocation and unless notice of the revocation is communicated through the Secretary of State to the beneficiary of the petition before such beneficiary commences his journey to the United States. If notice of revocation is not so given, and the beneficiary applies for admission to the United States, his admissibility shall be determined in the manner provided for by sections 1225 and 1226 of this title.

8 C.F.R. 206.1, in effect prior to December 1965,[1] provided in part:

> The approval of a petition made under [section] * * * 205 [now 204] of the Act * * * is

[1] The present (and renumbered) regulation, 8 C.F.R. 205.1, 30 Fed. Reg. 14775 (Nov. 30, 1965), as amended, 32 Fed. Reg. 6260 (April 21, 1967) reads in relevant part:

"The approval of a petition made under section 204 of the Act and in accordance with Part 204 of this chapter is revoked as of the date of approval if any of the following circumstances occur before the beneficiary's journey to the U.S. commences or, if the beneficiary is an applicant for adjustment of status to that of permanent resident, before the decision on his application becomes final:

"(a) *Relative petitions.* (1) Upon formal notice of withdrawal filed by the petitioner with the officer who approved the petition.

* * * * * * *

revoked as of the date of approval in any of the following circumstances:

* * * * *

(b) *Section 205* [now 204]. As to a petition approved under section 205 [now 204] of the Act:

(1) Upon formal notice of withdrawal filed by the petitioner with the officer who approved the petition.

* * * * *

QUESTION PRESENTED

1. Whether the regulation (8 C.F.R. 206.1(b)(1)),[2] providing for automatic revocation of the approval of a petition for preferred immigrant status upon formal notice of its withdrawal filed by the petitioning citizen spouse, is valid.

2. Whether, in the circumstances, petitioner was properly ordered deported for overstaying the authorized period of her visit.

STATEMENT

Petitioner, a citizen of Japan, was admitted to the United States as a visitor for pleasure for the six-month period from January 13 to July 12, 1965 (R. 24, 36).[3] On May 28, 1965 (within the authorized period) she married an American citizen. On June 14, 1965, her husband filed a petition with the Immigration and Naturalization Service to have her classi-

[2] See note 1, *supra*.

[3] "R." refers to the certified administrative record lodged with this Court.

fied as a preferred immigrant. The petition was approved on June 17. On July 13, 1965, petitioner instituted a divorce proceeding in a Tennessee circuit court alleging acts of mistreatment. Her husband requested the Service to withdraw his petition (R. 43). On July 29, 1965, the Service informed petitioner that, in view of her husband's withdrawal of the petition, she would have to depart the United States on or before August 27, 1965. Subsequently an extension of time was granted to October 27, 1965, to permit completion of the divorce proceeding. By letter to petitioner's counsel, the Service indicated that petitioner might request an additional extension on proof that the divorce action remained pending (R. 40, 43). No further requests for an extension of time were made. On December 17, 1965, the Service ordered petitioner to show cause why she should not be deported for having exceeded the authorized duration of her visit (R. 36). On January 28, 1966, new counsel for petitioner wrote the District Director at Atlanta that, because of illness, petitioner's former attorney had failed to request an extension of time beyond October 27, 1965, although the divorce proceeding was not yet completed. Counsel requested that the deportation hearing either be postponed or withdrawn to allow petitioner time to obtain her divorce (R. 42–46, 50–51). The District Director denied the requests but stated that, in the event petitioner was found deportable and ordered to depart before completion of the divorce action, consideration would then be given to staying the deportation order (R. 41).

At the deportation hearing on February 11, 1966, petitioner's counsel filed a formal motion seeking termination of the deportation proceeding and an extension of time for petitioner to remain in this country under the terms of her original visa. The motion also urged that the husband's action in withdrawing his petition to have petitioner classified as a preferred immigrant should be reexamined (R. 37–39). The Special Inquiry Officer denied the motion but indicated that, if petitioner were found deportable, he would consider the availability of discretionary relief (R. 21–22). Petitioner admitted the truth of the allegations contained in the order to show cause but denied deportability (R. 23–24). She also applied for the privilege of voluntary departure in lieu of deportation. The Special Inquiry Officer found petitioner deportable and denied her leave to depart voluntarily on both legal and discretionary grounds[4] (Pet. 26–28). Petitioner appealed the finding of deportability (but not the denial of voluntary departure) to the Board of Immigration Appeals. The Board affirmed the Special Inquiry Officer (Pet. 23–24), holding that, under applicable regulations, the withdrawal by the husband of the petition to have

[4] Petitioner admitted having committed adultery (R. 32–33) within the previous five years and was thus by law ineligible for the privilege of voluntary departure (Sections 101(f)(2) and 244(e) of the Act, 8 U.S.C. 1101(f)(2) and 1254(e) (1964 ed.)). In addition, petitioner had given a written statement on December 14, 1965, stating that she had entered this country to work, although she had told the consul that her purpose was to visit; and that she had married her husband, whom she did not love, for the purpose of remaining in the United States (R. 52–54).

petitioner classified as eligible for preferred status automatically resulted in revocation of the approval and rendered petitioner subject to deportation as an alien visitor who had overstayed her time. The Board noted that, under settled law, approval of a spouse's petition to have his or her alien spouse classified as a preferred immigrant conferred no right or status on the alien. The court of appeals affirmed *per curiam* (Pet. 21–22).

ARGUMENT

1. Petitioner contends that 8 C.F.R. 206.1(b)(1),[5] providing for the revocation of an approved petition for preferred immigrant status upon the withdrawal of the petition, is invalid on the grounds that it does not properly implement the underlying statute (Section 205 of the Act, 8 U.S.C. (Supp. II) 1155, *supra*, p. 2[6]), and that it violates due process and the Thirteenth Amendment (Pet. 10–18).

These arguments misconceive the limited purpose of the statute and the regulation. Congress has recognized that an American citizen who is married to an alien has an interest in obtaining permanent resident status for his or her alien spouse and has established a procedure for that purpose. The citizen must file a petition with the Immigration Service (Section 204 of the Act) seeking to have the alien classified as entitled to preferred status as the spouse of an

[5] Petitioner's assertion to the contrary notwithstanding (Pet. 4, 14), the present regulation (see note 1, *supra*) effects no substantial change from that cited above.

[6] Formerly Section 206 of the Act, 8 U.S.C. 1156 (1964 ed.).

American citizen under Section 201(b) of the Act, 8 U.S.C. (Supp. II) 1151(b).[1] When it is ascertained that the facts stated in the petition are true and that the alien beneficiary of the petition is entitled to preferred status, the petition is approved. In the usual case, when the alien spouse resides outside the United States, the approved petition is forwarded to the Secretary of State, who in turn authorizes the appropriate consular officer abroad to grant the alien a preferred immigrant visa. The alien then travels to a port of entry into the United States, where, if he passes immigration inspection, he is admitted for lawful permanent residence. Once permanent residence status has been acquired, a change of heart by the citizen spouse does not affect the alien's privilege to remain in the United States.

When the alien spouse who is the beneficiary of a citizen's petition is already present in this country, *e.g.*, on a temporary visitor's visa (as here), the alien spouse may seek adjustment of status to that of permanent resident (8 U.S.C. 1255 (1964 ed.)), without leaving the country.[2] A prerequisite for eligibility for that relief is that an immigrant visa be immediately available to the alien. An approved petition by the citizen spouse for classification of the alien as a preferred immigrant (because of the marital relationship) satisfies that prerequisite. Once adjustment of status is granted to the alien, and he (or she)

[1] Formerly Section 101(a)(27)(A) of the Act, 8 U.S.C. 1101(a)(27)(A) (1964 ed.).

[2] There are two exceptions, here irrelevant: the adjustment of status provision is by its terms inapplicable to alien crewmen and to natives of Western Hemisphere nations.

becomes a lawful permanent resident, a change of heart by the citizen spouse is similarly irrelevant to the alien's privilege to remain in the United States.[9]

In neither situation does the alien acquire any vested interest upon the mere approval of the petition filed by the citizen spouse, *i.e.*, before the status of lawful permanent resident has been accorded through admission to the United States or the grant of adjustment of status. All of the courts that have considered the question have so held, finding the regulation here at issue valid. See *Amarante* v. *Rosenberg*, 326 F. 2d 58 (C.A. 9); *Scalzo* v. *Hurney*, 225 F. Supp. 560 (E.D. Pa.), affirmed *per curiam*, 338 F. 2d 339 (C.A. 3), certiorari denied, 382 U.S. 849; *United States ex rel. Stellas* v. *Esperdy*, 366 F. 2d 266 (C.A. 2), vacated and remanded on other grounds, June 12, 1967 (see the government's Memorandum, No. 934 Misc., Oct. Term, 1966).

The crucial feature of the prescribed procedure is the desire of the citizen spouse to file a petition on behalf of the alien. Nothing in the immigration law requires a reluctant citizen spouse to file the petition, and Congress has not provided that an alien spouse may apply for preferential treatment independently. Under the statute, the alien spouse, prior to the grant of lawful permanent resident status, has a direct and protected interest, which he may assert in challenging the revocation of an approved petition, only when he has commenced his journey to the United States

[9] Petitioner did not apply for adjustment of status following approval of her husband's petition.

without notice of revocation—in which event his admissibility upon arrival is to be determined in the ordinary manner provided by other sections of the Act.[10] That this is the sole instance in which rights of the alien spouse under a visa petition are recognized reflects Congress' judgment that, until that point is reached, the right to obtain the statutory benefit is personal to the petitioning citizen spouse. Thus, the alien acquires no vested interest when a visa petition is first approved. See cases cited above.[11]

[10] Significantly, when Congress has intended to confer a benefit based on a family relationship enforceable by the alien, it has done so expressly. For example, the spouse, parent or child of a citizen who fraudulently procured admission to the United States is immunized from deportation solely by reason of the relationship, if he was otherwise admissible at the time of entry. Section 241(f) of the Act, 8 U.S.C. 1251(f); see *Immigration and Naturalization Service* v. *Errico*, 385 U.S. 214.

[11] Petitioner seeks to rely on that portion of Section 205 which provides that revocation shall not be effective unless "notice * * * is communicated * * * to the beneficiary of the petition before such beneficiary commences his journey to the United States" (see Pet. 12–16). But the quoted portion of the section is inapposite here; it is directed only to the alien who is abroad when the petition is filed and who journeys to this country in reliance upon the approval of the petition. In that situation, Congress felt that, even though the petition be revoked, the alien who relied upon its approval to the extent of traveling to the United States should be processed for admission notwithstanding the change. Neither the statute in terms, nor the reason underlying the provision (reliance) is applicable here, since petitioner was already in this country when she married a citizen, who then filed the petition. Obviously, in this circumstance, notice of revocation could never be communicated to the alien prior to embarkation for the United States (as petitioner's construction of the statute requires), because the petition was neither submitted nor approved until after petitioner had been in this country and had married a citizen.

The procedure established under Section 204, 8 U.S.C. (Supp. II) 1154, enables the citizen spouse to obtain preferential and expedited treatment for his (or her) alien spouse. If, prior to the alien's acquiring permanent resident status, the marital relationship is no longer viable from the standpoint of the citizen spouse, the Attorney General has determined (8 C.F.R. 206.1(b)(1)) that the reasons for that preferential treatment fail.[11] Viewed in light of the limited purpose of the statute, the regulation providing for revocation of an approved petition upon a formal withdrawal by the petitioning citizen spouse comports with the "good and sufficient cause" standard of Section 205, 8 U.S.C. (Supp. II) 1155, and satisfies the requirements of due process. See *Pacheco Pereira* v. *Immigration and Naturalization Service*, 342 F. 2d 422 (C.A. 1); *Scalzo* v. *Hurney, supra; Mantyk* v. *Sahli*, 161 F. Supp. 199 (E.D. Mich).

2. Petitioner contends that it was an arbitrary exercise of discretion for deportation proceedings to be instituted against her, since her lawyer, because of illness, failed to request an additional extension of time to enable petitioner to remain in this country pending completion of her divorce action. In view of the availability of discretionary relief following an adjudication of deportability, it was not an abuse of discretion for the Service to institute deportation

[11] We again stress that when the alien spouse perfects his (or her) permanent resident status, he is then fully protected as a lawful permanent resident, and his continued marital relationship with a citizen is no longer relevant, except, of course, if the marriage had been a sham (see Section 241(c) of the Act, 8 U.S.C. 1251(c) (1964 ed.)).

proceedings. Indeed, the Special Inquiry Officer indicated that he would consider a stay of deportation to allow completion of the divorce proceedings. That relief, however, was never sought. It ultimately proved unnecessary, since petitioner obtained her divorce prior to the argument in the court of appeals (see Pet. 22).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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